

***United States Court of Appeals
for the Second Circuit***



**APPELLANT'S
PETITION FOR
REHEARING
EN BANC**

76-1346

In The

UNITED STATES COURT OF APPEALS

For the Second Circuit

BPLS

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

vs.

WALTER R. CONLIN,

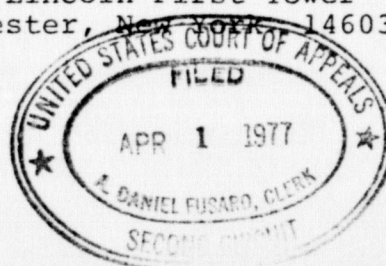
Defendant-Appellant.

Appeal from a Judgment of Conviction in
the United States District Court for the
Western District of New York at 74-265

PETITION FOR RE-HEARING WITH
A SUGGESTION FOR A
RE-HEARING IN BANC

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Of Counsel



UNITED STATES OF AMERICA,

-VS-

Defendant-Appellant.

76-1346

This petition is submitted on behalf of the defendant-appellant Walter R. Conlin pursuant to Rules 40 and 35 of the Federal Rules of Appellate Procedure for a rehearing with a suggestion for a rehearing in banc of the above appeal on the grounds that the decision dated March 17, 1977 reflects a misstatement of the facts and a misapprehension of established constitutional principles of law. This petition is directed to the Court's conclusion that the government's introduction in its direct case of evidence that the defendant remained silent at the time of his arrest and in the wake of Miranda warnings was not reversible error. The discussion below relates initially to the misstatement of facts contained in the Court's opinion and is followed by an analysis of the Court's misapprehension of the applicable constitutional principles of law.

I. Misstatement of Facts

The Court's decision contains significant misstatements of fact with respect to the testimony presented by the government including the direct examination of Mr. Cristofero and the cross-examination of this witness by defense counsel. In the interest of eliminating any question regarding the content of that testimony as well as the direct examination of the two FBI agents, there is attached to this petition and separately marked the pertinent direct examination of Mr. Cristofero (Exhibit A), the pertinent cross-examination of Mr. Cristofero (Exhibit B) and the direct examination of FBI agents Rudy and Bucher (Exhibit C).

(A) At pages 2378-79 of the Court's opinion it is stated in reference to the direct examination of Mr. Cristofero:

"He testified that he asked Conlin what he was doing, told him that destroying government documents was a crime, and Conlin said nothing."

At page 58 of the trial transcript involving the questioning on direct examination, Mr. Cristofero answered as follows:

"Q. What if anything did he say at that time?

A. He didn't say anything. Then I asked him to return the copy. He said, "No, I will

get the originals for you." I said, well, I don't need the originals, all I need are the copies." (Trans. p. 58)

(B) Furthermore, in the Court's opinion at page 2379 it is stated:

"During the cross-examination of Mr. Cristofero Conlin's counsel went squarely to the issue of what was said by Conlin to the witness or to the FBI seeking an admission that Conlin had from the outset told Cristofero that he had brought the documents with him to the office that day and that he intended merely to leave with what he had brought." (Emphasis added)

According to the trial transcript in which the cross-examination of Mr. Cristofero occurred on this issue (Trans. pp. 114-116), it is apparent that the defense attorney questioned Cristofero as to what Conlin had said to him and not to the FBI who hadn't even arrived at the scene:

"Q. And you told us Mr. Conlin didn't say anything in return, is that right?

A. I can't remember him saying anything other than the fact that he did say, "I will bring you the originals."

. . .

Q. Didn't he argue and say to you, "I came in with these papers, and I can take them out with me."

A. He might have said that.

Q. Do you remember him saying that more than once.

A. I don't remember him saying it."

Based upon a review of this portion of the trial testimony (Trans. p. 114), Exhibit B, it is quite evident that the defense counsel never asked the witness what Mr. Conlin had stated to the FBI. The only question directed to Mr. Cristofero which dealt with Conlin's statements to others was a telephone conversation with Mr. Larimer who was the Assistant United States Attorney in Rochester (Trans. p. 115). There was simply no question, however, directed at what Mr. Conlin has stated to the FBI contrary to the above statement in the Court's opinion.

(C) In the Court's opinion at p. 2379 there is a compounding of the misstatement of fact when it is stated:

"When it became apparent that Conlin was adopting the position that he had spoken throughout the episode and had told both the SBA and FBI officials that he had brought the documents with him on January 18, the U.S. Attorney brought out what he understood to be the facts."

It appears quite clear from the brief cross-examination by defense counsel on this subject (Trans. pp. 114-116) that there was never any question directed to Mr. Cristofero regarding what Conlin had stated to the FBI officials or whether in fact he had even spoken to the FBI.

(D) The Court's opinion also makes the distinct impression that somehow the defendant introduced evidence of an exculpatory statement being given at the time of his

arrest before the government presented the testimony of the FBI. This impression is stated as follows at page 2379:

"Appellant's contentions concerning the making of exculpatory statements raised an issue which the government was entitled to meet."

Furthermore the Court stated at page 2380:

"The better course for the trial judge would have been to caution the jury that the evidence of Conlin's silence after receiving his Miranda warnings was being received solely to rebut Conlin's version of the incident. . ."

The impression is quite clear in reading this portion of the opinion that the testimony of the FBI agents was used to rebut Conlin's version, when in fact Conlin had yet to testify, and there was simply no evidence to rebut.

A review of the transcript of Mr. Cristoforo's direct and cross-examination will clearly reveal that his testimony did not deal with anything the defendant had stated to the FBI agents. More significant is the fact that Cristoforo denied hearing any exculpatory statement and therefore there was no evidence presented of an exculpatory statement by the defendant (either pre or post arrest) prior to the testimony of the FBI.

II. Misapprehension of Legal Principles

The decision of this Court misapprehended the applicable law with respect to the prohibition against

introducing evidence of a defendant's silence at the time of his arrest and after Miranda warnings had been given to him.

Even before the Supreme Court's decision in Miranda v. Arizona, 384 U.S. 436 (1966), it had become an established constitutional principle that a defendant's Fifth Amendment rights were violated if the prosecution introduces evidence of a defendant's silence at the time of arrest or at a pre-trial proceeding or comments on the defendant's silence at the time of trial. Bram v. United States, 168 U.S. 532, 562 (1897), Malloy v. Hogan, 378 U.S. 1, 8 (1964), Wilson v. United States, 149 U.S. 60 (1893) and Griffin v. California, 380 U.S. 609 (1965).

Furthermore, in Grunewald v. United States, 353 U.S. 391 (1955) the Court held that it was reversible error when a defendant was cross-examined at the time of trial regarding his silence at a previous Grand Jury proceeding. See also Johnson v. United States, 318 U.S. 189, 196-199 (1942).

With the issuance of the opinion in Miranda v. Arizona, supra, a new area of protected silence was established. The Court referred to this protected area when it stated at page 468 in footnote 24:

"In accord with our decision today, it is impermissible to penalize an individual for exercising his Fifth Amendment privilege when

he is under police custodial interrogation. The prosecution may not, therefore, use at trial the fact that he stood mute or claimed his privilege in the face of accusation."

This Court recognized the principle in United States v. Mullings, 364 F 2d 173 (2nd Cir. 1966) when it held that reversible error occurred when the government introduced evidence in its direct case that the defendant remained silent at the time of his arrest. In finding this error the Court stated:

"Having been placed under arrest, he had the right to remain silent. It is well settled that an inference of guilt may not be drawn from a failure to speak or to explain when a person has been arrested." (364 F 2d at p. 175)

This principle was expanded in this Circuit in United States v. Semensohn, 421 F 2d 1206 (2d Cir. 1970) when the court held that error resulted when the defendant was cross-examined on his silence at the time of his arrest.

The Supreme Court followed the above principles in United States v. Hale, 422 U.S. 71 (1975) wherein the Court held that reversible error occurred when a defendant was cross-examined and forced to admit that he remained silent at the time of his arrest, even though he gave an exculpatory version in his direct testimony. The Court affirmed the reversal of the conviction not on constitutional grounds

but on its supervisory authority over federal courts. More recently, the Supreme Court decided the case of Doyle v. Ohio, 44 U.S. LW 4902, 49 L Ed 2d 91 (June 17, 1976) and held that in a State court trial a defendant was denied his Fourteenth Amendment rights when the prosecution cross-examined him with respect to his silence at the time of arrest.

In view of the clear and unequivocal mandates of the Supreme Court and the previous decisions of this Circuit Court it is apparent that the following legal principles are firmly established:

1. The prosecution is prohibited from commenting on a defendant's silence at the time of trial;
2. The prosecution is prohibited from introducing in its direct case evidence of the defendant's silence at the time of his arrest or at any pre-trial proceeding;
3. The prosecution is prohibited from cross-examining a defendant who testifies on his own behalf and gives an exculpatory version of his conduct although he remained silent at the time of his arrest.

The only exception to these principles is the reference made in a footnote in Doyle v. Ohio, supra, wherein it stated:

"It goes almost without saying that the fact of post-arrest silence could be used by the prosecution to contradict a defendant who

testifies to an exculpatory version of events and claims to have told the police the same version upon arrest. In that situation the fact of earlier silence would not be used to impeach the exculpatory story, but rather to challenge the defendant's testimony as to his behavior following arrest." (Emphasis added) (49 L Ed at p. 98)

This principle would be consistent with the doctrine in Harris v. New York, 401 U.S. 222 (1971) wherein the Court held that a defendant's credibility may be impeached through the use of an otherwise inadmissible confession. The Supreme Court appears to have made it eloquently clear that silence or an inadmissible confession is only introduced to impeach a defendant's credibility once he has testified to an inconsistent set of facts.

In the instant case, it is respectfully requested that the Court re-examine its reasoning with respect to this issue, since the defendant is confident that any re-examination will reveal the grave error that occurred.

To begin with, it is evident that the Court has concluded that the prosecution was justified in introducing in its direct case evidence of the defendant's silence at the time of his arrest because the defendant had waived his privilege since he allegedly first raised the issue. Based upon the constitutional principles involved, it is clear that the defendant would first have to present some testimony that he gave an exculpatory version at the time of his

arrest in order for the government to introduce the inadmissible evidence. The following questions therefore need to be asked:

1. Does the record reflect any evidence presented by the defendant that he gave an exculpatory version in the wake of his Miranda warnings.

The record clearly indicates that no such testimony was presented by the defendant in the cross-examination of any government witnesses before the testimony of FBI agents Rudy and Bucher.

2. Did the defense attorney even attempt to elicit testimony with respect to the defendant giving an exculpatory version of the events at the time of his arrest.

A search of the record will reveal that the defense attorney's questions were directed to Mr. Cristoforo at a time prior to the defendant's arrest and prior to the Miranda warnings being given to him and at a time when the FBI agents weren't even present.

In view of the above, this Court can't be serious when it concludes that the questions of defense counsel are considered to be probative evidence of the defendant's exculpatory statements made at the time of arrest. It is elementary that questions of counsel are not evidence, and one doesn't present testimony to impeach a defendant's credibility based upon a question propounded by the defense

attorney. Furthermore, the questions of defense counsel were not directed to the arrest or Miranda warnings period.

In addition, despite the questioning by defense counsel, Mr. Cristofero maintained that the defendant did not give any exculpatory statements and therefore there was no inconsistency for the government to rebut.

It is also significant to note that when the defendant finally testified at trial, he was cross-examined by the U.S. attorney regarding his silence and his request for counsel at the time the FBI agent interviewed him (Trans. pp. 1286-1288). This cross-examination alone constituted a reversible error based upon the holdings in United States v. Hale, supra, Doyle v. Ohio, supra, and United States v. Semensohn, supra. The Court's opinion, however, never made note of this additional error.

The Court's sole authority for holding that the introduction of inadmissible silence was not error was the case of United States v. Fairchild, 505 F 2d 1378 (5th Cir. 1975). This case is not only easily distinguishable on its facts, but it is significant to note that it was decided by the Fifth Circuit prior to United States v. Hale, supra, and at a time when that Circuit held a view on the use of silence contrary to the Second Circuit's holdings and the position ultimately taken by the Supreme Court in United States v. Hale, supra.

The Fairchild court determined that the police officer's testimony concerning the defendant's silence following his Miranda warnings was not inadmissible since the defense attorney had cross-examined a FBI agent as follows:

"During the period of time that this investigation has been going on, to your knowledge has Mr. Fairchild cooperated fully with the FBI and U.S. Attorney's office in responding with anything that you all wanted?" (505 F 2d at p. 1383)

Although the Court's opinion does not relate the answer, it implies that the agent was forced to admit that the defendant had cooperated. It is apparent that the defense attorney's question opened Pandora's box and therefore the Court concluded that the defendant had introduced evidence which the government was entitled to rebut.

In the instant case, the defense attorney was not successful in obtaining any evidence from Mr. Cristoforo that an exculpatory statement was made by the defendant prior to the arrival of the FBI. More importantly, the defense attorney never even attempted to elicit from the witness what the defendant had stated to the FBI after he was arrested and given his Miranda warnings.

As mentioned above, it is apparent that the legal basis for the Fairchild decision has been implicitly overruled by the Supreme Court's holdings in United States v.

Hale, supra and Doyle v. Ohio. This is also evidenced by that Circuit Court's reconsideration of its ruling in United States v. Impson, 531 F 2d 274 (5th Cir. 1976) after the Supreme Court issued its opinion in United States v. Hale, supra.

Although the Court's opinion did not discuss the question of harmless error, it is evident that the error that occurred was not harmless. The government in its brief on appeal asserts that the major issue on all counts in the Indictment was "credibility". (Gov. Brief pp. 4, 6, and 7). The government also states in its brief that:

"The use by the prosecution of the defendant's silence after the Miranda warnings were given for purposes of impeaching the defendant's credibility regarding his false exculpatory statement..." (Gov. Brief p. 13)

It is therefore clear that the inadmissible evidence was intended to effect all the counts of the indictment and it is evident that it accomplished its intended purpose.

CONCLUSION

It is respectfully requested that in view of the grave error that occurred with the introduction of the defendant's silence at the time of his arrest, and since the defendant had presented no evidence reflecting an exculpatory statement being made at the time of the arrest, this

Court should grant the petitioner's request to rehear this matter and reverse the conviction.

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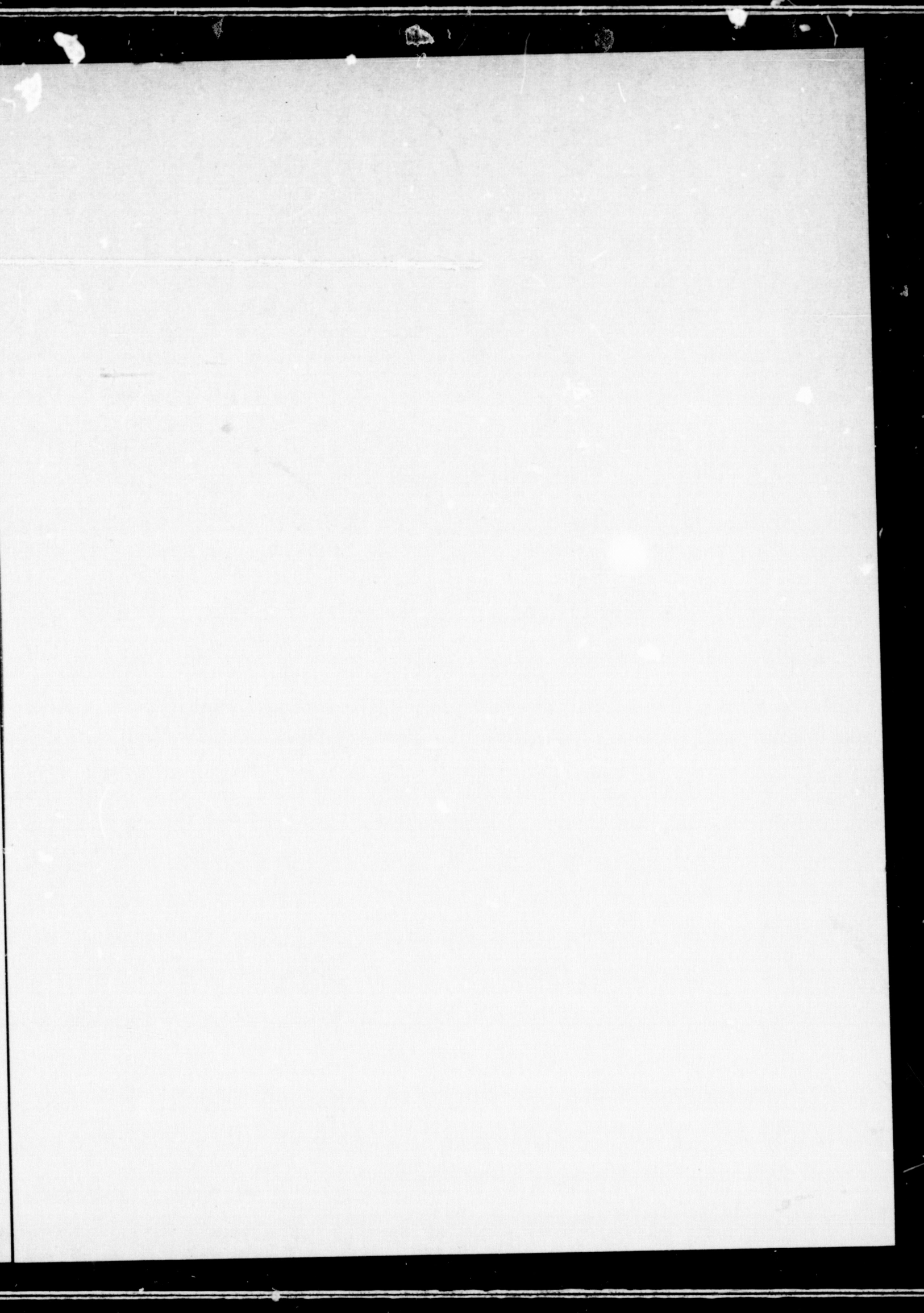
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DIRECT EXAMINATION OF

JAMES J. CRISTOFARO

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EXHIBIT A



came to the office, is that right?

A Yes, it is.

Q What did you do with that letter after they had signed the tax returns and had given them back to you and you put them on the desk? What next happened?

A I handed the letter to Mr. Gill, and asked him to read it, and that if they had any questions to please ask them, and Mr. Gill read the letter, and I believe Mr. Conlin read the letter. And at that point I started talking to Mr. Gill again about the use of proceeds and the loan request itself, and Mr. Conlin picked up the copies of the tax returns from my desk and stuffed them into his briefcase.

MR. HOULIHAN: Your Honor, may I read this one paragraph, and this is a letter dated January 18, 1974, well within the date.

THE COURT: All right.

MR. HOULIHAN: And the third paragraph of that letter says: "It may be necessary to verify the accuracy of the figures on the tax returns; therefore, the SBA would like to have written

permission from you to verify the accuracy of your tax returns with the Internal Revenue Service. It would be helpful if you requested stamped copies from the IRS and deliver them to us."

Is that an accurate reading of that paragraph?

A Yes.

Q It was after Mr. Conlin read that that he took the returns from your desk, is that correct?

A Yes.

Q He put them in his briefcase, is that right?

A Yes, he did.

Q And what, if anything, occurred after that?

A I saw him do this, and I told Mr. Conlin that the copies were, in fact, a part of our file; therefore, not removable except by authorized employees or upon written request from an applicant.

Q And what, if anything, did he say at that time?

A He didn't say anything. And I asked him to return the copies. He said, "No. I will get the originals for you."

I said, "Well, I don't need the originals. All I need are the copies."

And he just left them in the briefcase.

Q Did you again ask him to give them back to you?

A I asked him several times to return them to us.

THE COURT: You mean at that particular instance or later?

A At that particular instance. I also turned to Mr. Gill and said, "Mr. Gill, these are supposed to be copies of your tax returns. Will you please advise your representative to give them back to us?"

Mr. Gill was just standing there somewhat dumbfounded. He didn't say anything, nor did he do anything. So I advised Mr. Conlin that taking these things as he did might constitute an unlawful offense.

Q What did he say to that?

A He didn't say anything.

Q Was there any conversation between you and Mr. Conlin and Mr. Gill subsequent to that which you have already told us?

A No. Will you state the question again?

Q All right. You apparently asked him two or three times to give you back the returns, and he said, "No." Was there any other conversation at that time that you can recall?

A No.

Q And did there come a time that you asked someone else to come into the office?

A Yes. I asked Mr. Garrity to come in and advised Mr. Garrity that Mr. Conlin had removed the copies from the file, and then Mr. Garrity asked him to please return the copies, that they were not his property at that time.

Q And what did Mr. Conlin say?

A Mr. Conlin didn't say anything, to my knowledge. He just stood there.

Q And he was standing up? Was Mr. Gill standing up?

A I believe at that time they were both standing up.

Q And was Mr. Conlin doing anything at that time?

A Well, I advised Mr. Conlin that I would call the FBI if he did not return them. So I did pick up the phone and started to call the FBI, and at that point Mr. Conlin began to rip the documents --

THE COURT: To what?

A To rip and tear up the documents in his briefcase.

Q You were standing there watching him doing this, is that right?

A Yes, I was.

Q When you told him that you were going to call the FBI, did he say anything?

A He just stood there.

Q He didn't say anything to you?

A Not that I can recall.

THE COURT: We will take a short
recess.

(Recess from 3:35 P.M. to
3:50 P.M.)

DIRECT EXAMINATION CONTINUED

BY MR. HOULIHAN:

Q Mr. Cristofaro, just before the recess you mentioned that
you had called the FBI?

A Yes.

Q You made that call personally, is that right?

A Yes, I did.

Q Who did you get?

A I asked for Mr. Bucher or Mr. Rudy. I don't know who I
talked to.

Q And did you explain to them what was happening?

A Yes.

Q What did you ask him to do?

A They indicated to me that they would come right over.

Q Now after the telephone call to the FBI --

THE COURT: You were talking to

somebody in the FBI right in Corning?

A In Elmira.

THE COURT: In Elmira?

A Yes.

THE COURT: All right.

Q Did Mr. Conlin say anything to you during this period of time?

A After I called the FBI, Mr. Conlin asked if he could call his lawyer. I said, "Yes."

Q And did he?

A He tried to. He was unable to reach him.

Q Where were the tax returns during this period of time?

A After I called the FBI, Mr. Conlin was apparently in the process of tearing them up. I also told him that not only had he removed property that was in possession of our agency, but he was also destroying them, and this could constitute unlawful action.

Q And did he say anything to you in response to that?

A No. At that point he seemed to be in a hurry to leave.

Q And was he standing up throughout this period of time?

A Yes.

Q And what was Mr. Gill doing at this time?

A Mr. Gill was just standing there and not saying anything.

Q Mr. Gill didn't say anything at all?

A No.

Q Did there come a time that Mr. Conlin wrote something to you?

A Yes. Mr. Conlin wrote on a piece of paper, something to the effect of, "I hereby withdraw the application," and asked Mr. Gill to sign it, which Mr. Gill did, and threw that on my desk.

MR. HOULIHAN: Would you mark this for identification?

(Government's Exhibit 3 marked for identification.)

Q Are you familiar with Government's Exhibit 3 marked for identification?

A I'm not familiar with this. I don't recall it.

Q You don't recall this one?

A No, I don't.

THE COURT: Just a moment. You said you spoke about a withdrawal, which you said they signed and threw on your desk. That is not the one?

A No. Mr. Gill signed a little sentence which Mr. Conlin had written.

CROSS-EXAMINATION OF

JAMES J. CRISTOFARO

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EXHIBIT B

A Not positively, no. We had a copier.

Q And was it capable of copying two sides of a page?

A I don't think so.

Q It was only capable of copying on one side?

A I think so.

Q Now in regard to this meeting in your office, you said at one point you noticed that Mr. Conlin was tearing some paper, is that correct?

A Yes.

Q Was he standing or sitting when you noticed that?

A I believe he was standing.

Q Now did he have his coat on?

A I am not positive.

Q Did he have his hat on?

A I am not positive.

Q Where was Mr. Gill when you saw this? Where was he in the room?

A He was to my right.

Q And how far was Mr. Gill from Mr. Conlin?

A Two or three feet.

Q Right next to him?

A Yes.

Q When was it in time that you noticed that Mr. Conlin was

ripping or tearing some papers?

A I don't know the exact time, but it was sometime around twelve o'clock, I suppose.

Q And that was about a half hour after they had been in there?

A Yes.

Q And how long was it, after the FBI was called, or before?

A It was after.

Q And about what time did the FBI arrive?

A About ten minutes later.

Q And that would be about twelve ten?

A Somewhere around there.

Q Were you familiar with the FBI phone number at that time?

A No.

Q Did you look it up before you called?

A Yes.

Q Did you know where their office was before you called?

A Yes, I knew they were in the Post Office Building.

Q Had you had anything to do with the FBI before you called?

A In what respect?

A Any business with them or anything?

A I had met both of them before. I don't know if I had any specific business.

Q Were these agents regularly stationed in Elmira?

A I think so.

Q And they lived in the Elmira vicinity?

A I guess they do.

Q You told Mr. Conlin that he couldn't take those papers with him, is that correct?

A Yes.

Q And you told us Mr. Conlin didn't say anything in return, is that right?

A I can't remember him saying anything other than the fact he did say, "I will bring you the originals."

Q But he never argued with you, or he never said anything back when you said, "You can't take them"?

A We had a short discussion, but I can't remember what was said.

Q Didn't he argue with you and say to you, "I came in with these papers, and I can take them out with me"?

A He might have said that.

Q Do you remember him saying that more than once?

A I don't remember him saying it.

Q Do you remember him arguing with you and not just sitting back and having you talk, as a one-sided conversation?

A I can't remember what he said, if anything.

Q You told us yesterday that every time you said something to him that he just stood there and didn't say anything and didn't reply to you?

A I kept asking him to return the papers to me.

Q Didn't he argue with you and say, "These are my papers. I came in with them, and I can go out with them"?

A I don't recall him saying that. He did say he would get the originals.

Q In your presence, after the FBI got there, the FBI called Mr. Larimer, Assistant United States Attorney in Rochester?

A I think he did, yes.

Q At that point Mr. Conlin was put on the phone to talk to him, was he not?

A I think so, yes.

Q And did he tell that gentleman, in your hearing, "These are my papers. I came in with them, and I'm going to take them out with me"?

A I don't recall what he said.

Q Did he say he brought them there that day, January 18, 1974?

A I don't recall.

Q To your knowledge, at that same time was he permitted to call an attorney?

A Yes. He attempted during the whole course of events to make two calls.

Q Did he talk to an attorney by the name of Mr. Walsh or Mr. Welch from Corning?

A I can't remember whether or not he was able to reach Mr. Walsh.

Q Do you recollect him telling Mr. Walsh, "I came in with these papers, and I think I have a right to take them out"?

A No, I don't.

Q Did you understand why he was arguing with you for not returning them to you?

A The fact is that he did not have the papers when he came in with them. I had them.

Q But didn't he say that he brought them in?

A He might have said that.

Q Do you know whether or not he had any income tax papers with him when he came to your desk?

A No, I don't know if he did or not.

Q Do you know whether or not he had any papers of any returns with him when he came to your desk, in his briefcase?

A I don't know.

MR. HOULIHAN: Objection, Your

DIRECT EXAMINATION OF
FBI AGENT RICHARD RUDY

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DIRECT EXAMINATION OF
FBI AGENT ROBERT BUCHER

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A Yes. I am no accountant, but I do know there is a difference.

MR. LEVY: That is all. I have no further questions.

MR. HOULIHAN: I have no further questions.

(Witness excused.)

THE COURT: We will take a recess.

(Recess from 11:45 A.M. to
12:00 P.M.)

R I C H A R D W. R U D Y,
called as a witness by the Government, being first duly sworn, testified as follows:

DIRECT EXAMINATION

BY MR. HOULIHAN:

Q Mr. Rudy, by whom are you employed?

A The Federal Bureau of Investigation.

Q How long have you worked for the FBI?

A Almost twenty-three years.

MR. LEVY: As I understand it,
this gentleman has been sitting in the
courtroom for some time.

Q Have you been seated in the courtroom?

A No, sir.

MR. LEVY: All right, my mistake.

Q How long have you worked for the FBI?

A Almost twenty-three years.

Q Where is your duty station?

A Elmira, New York.

Q I call your attention to the date of January 18, 1974.
Were you in Elmira on that date?

A Yes, sir.

Q And did there come a time on that date that you received
a call from someone at the Small Business Administration
office?

A Yes, sir.

Q Would you please tell the ladies and gentlemen of the
jury what transpired in that telephone conversation?

A It was approximately noontime on that date, and I was
seated at my desk. I received a phone call from James
Cristofaro, a Loan Officer at the Small Business Adminis-
tration in Elmira, New York, and he informed me that he
had one Walter Conlin in his office at that time.

MR. LEVY: Wait a minute. I ob-
ject to what he informed him.

THE COURT: I sustain the objec-
tion. It is sufficient that he got the

call.

Q What, if anything, did you do in response to that telephone call?

A I went to the Small Business Administration office.

Q Were you alone at the time?

A No. My partner went with me.

Q Who was your partner?

A My partner is Robert Bucher.

Q And what, if anything, did you do when you arrived at the Small Business Administration office?

A After a discussion with Mr. Cristofaro, who explained the circumstances of what was going on at the time, I went and spoke with Mr. Conlin.

Q About how long a period of time passed between the time you received the telephone call and the time you arrived at the office?

A Approximately ten to fifteen minutes.

Q Did you then speak with Mr. Conlin?

A Yes, I did, sir.

Q What did you tell him at that time?

A I told Mr. Conlin that I had been called to the SBA because there had been an allegation made that he had taken government papers, or property, and that he was destroying

this property, and I wished to discuss this matter with him.

Q And what was Mr. Conlin doing at this time?

A When I got to the SBA office, he was just kind of roaming around the room.

Q And did he have anything in his hands?

A Not that I recall at the time, sir.

Q And at the time that you spoke with him, was he standing there, or was he seated?

A No. We were both standing, and I said, as I explained my reason for being there, I said that prior to talking to him, I would like him to read a statement of his rights. I produced this statement, and he read the same.

MR. HOULIHAN: Would you mark these for identification?

(Government's Exhibits 47, 48, 49 and 50 marked for identification.)

Q I show you Government's Exhibit 47 marked for identification, and can you tell me what that is?

A Yes. This is the statement of rights that I showed to Mr. Conlin, which he read.

Q And did he sign that?

A No, he did not, sir.

Q Did you ask Mr. Conlin to sign that?

A Yes, I did, sir.

Q What, if anything, did you say?

MR. LEVY: I object.

THE COURT: Objection is overruled.

A He declined and said he wanted to talk to his lawyer.

Q Was he allowed to call his lawyer?

A Yes, he was.

Q Did you read what purports to be a statement of his Constitutional rights?

A No, I did not read it to him, no, sir. He read it himself.

THE COURT: He did read it?

A Yes, sir.

THE COURT: You saw him read it?

A Yes, sir.

Q I show you Government's Exhibit 49 marked for identification. Can you tell me what that is?

A Yes. This is a log showing the attempted interview with Mr. Conlin by myself.

Q And did you interview Mr. Conlin?

A I made an attempt to. I did not because he would not respond to my questions.

Q And what was the time of the interview, the time that the interview began and the time that it terminated?

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A The interview began at 12:14 P.M., at which time I gave him the statement of his rights. He returned this statement to me at 12:16, at which time he said that he refused to sign it.

Q Subsequent to the time that Mr. Conlin declined to sign the statement and refused an interview with you, what transpired?

A Well, I made an effort to contact the then Assistant United States Attorney, David Larimer, for an opinion on this matter as to what we should do --

THE COURT: He was in Rochester,
and you telephoned him?

A Yes, sir, I telephoned him, sir.

Q And what was Mr. Conlin doing during this period of time?

A At this time he was just walking around the room with these other SBA employees and my partner, talking to him, milling around the office.

Q Was Mr. Conlin talking with you within hearing distance?

A No, sir, I was not within hearing distance of Mr. Conlin.

Q Did there come a time that Mr. Conlin was placed under arrest?

A Yes.

Q I show you Government's Exhibit 48 marked for identifica-

tion. Can you tell me what that is?

A Yes. This is what we referred to as an Arrest Log, and it shows the occurrences that took place from the time we arrested him until, in this case, he was released by the U. S. Magistrate.

Q What time was Mr. Conlin placed under arrest?

A 12:49 P.M.

Q And what, if anything, did you say to him at that time?

A I just told him that he was arrested for theft of government property.

Q Did there come a time that Mr. Conlin was searched?

A Yes, sir.

Q And when was that?

A Just within minutes after the arrest, my partner and I took him to a private room in another part of the building.

Q And what, if anything, did you do when you got to the private room?

A We asked him to remove his clothing, which he did, and we searched his clothing, and we found papers in various parts of his clothing and body.

Q Were the papers in his pockets?

A Yes, sir. These papers, which were all torn up, or at

least appeared to be torn, were in his trouser pockets, in his suit coat pockets, his overcoat pockets and secreted beneath his shirt and undershirt, and he also had some in his hand.

Q Did you collect these papers?

A The ones we found on him at that time, yes, we collected those, and I became custodian of those papers, and then I subsequently got another pile of papers from Mr. Garrity of the SBA.

Q Do you know where Mr. Garrity got those papers?

A He said he had picked these up --

MR. LEVY: I object to what he said.-

THE COURT: Objection is overruled.

THE WITNESS: He said he picked these up from the floor where Mr. Conlin had dropped them.

Q Did you take a picture of those papers?

A Yes. Subsequently, I took all of these papers, and I made four separate piles, and I identified each pile as to where these particular papers came from, and then I took two Polaroid photographs of those four piles.

Q I show you Government's Exhibit 50, which consist of

two photographs, and they appear to be identical, are they?

A These are two separate Polaroid photos of the same stacks of paper, right.

Q And these were taken by you?

A By myself.

Q Do these reasonably show the papers as they existed at the time?

A Yes.

MR. HOULIHAN: I offer G-50.

MR. LEVY: No objection.

THE COURT: Received.

(Government's Exhibit 50 marked
in evidence.)

Q Calling your attention to Government's Exhibit 50 marked in evidence, there appears to be four different piles of paper here. And Pile No. 1, can you tell me why that is identified as "Pile No. 1"?

A I don't recall which pile is which, but I identified each pile as the location from which it came from. One pile came from his hand; one pile came from Mr. Garrity, that he had collected, and one pile were the papers taken from beneath his dress shirt and his undershirt, and the other pile were the papers that had been taken from all of the

pockets of his clothing.

Q What, if anything, did you do with those papers when you finished collecting them and photographing them?

A I packaged those papers up, and I shipped them to our Laboratory and asked them to try to reconstruct just what these papers were.

Q And these were papers that were subsequently reconstructed by the FBI Laboratory, and they represent Government's Exhibit 10, 7, 8, 12, 13, 9, 6, 11 and 5, is that correct?

A Yes, sir.

Q Now subsequent to the time that you arrived at the Small Business Administration and you ultimately searched Mr. Conlin, at any time did he make any statements to you?

A No, not to me, sir.

Q And did he at any time request that he talk to his lawyer, that he be able to call his lawyer?

A Yes, sir, and he made several attempts to contact his lawyer -- by phone, that is.

Q And at any time did Mr. Conlin speak to Mr. Larimer, the Assistant U. S. Attorney, that you called?

A Not that I recall.

Q And who was present during the search?

A Just myself and my partner and Mr. Conlin.

Q And subsequent to that search, did you take Mr. Conlin over to your office in Elmira?

A Yes, we did, sir.

Q And according to Government's Exhibit 48, this was at 1:08?

A Yes, at 1:08, we transported Mr. Conlin to our office in Elmira.

Q And did you give him lunch at that time?

A He was offered lunch, but he declined.

Q And that is noted on your log, is that correct?

A Yes, sir. This was somewhat later in the day that he was offered lunch at 1:40 P.M.

Q Mr. Rudy, during the period of time that you were at the Small Business Administration office, did you see Mr. Conlin ripping anything?

A I saw his fingers moving, and then I saw small bits of paper falling to the floor.

MR. HOULIHAN: That is all the questions that I have.

CROSS EXAMINATION

BY MR. LEVY:

Q When you searched Mr. Conlin, did you search his briefcase?

A We looked into his briefcase.

Q You didn't know how much you paid any one of the doctors, did you?

A No.

Q Your wife just put a total amount down as far as the doctors are concerned?

A Right.

Q When Mr. Conlin asked you about the doctors, did you tell him you would get the amounts for him?

A No.

Q You didn't have any bills in front of you, doctor bills, when you went to see him?

A I can't say for sure what I did have.

MR. LEVY: No further questions.

MR. HOULIHAN: I have no further questions.

(Witness excused.)

R O B E R T W. B U C H E R,

called as a witness by the Government, being first duly sworn, testified as follows:

DIRECT EXAMINATION

BY MR. HOULIHAN:

Q Mr. Bucher, by whom are you employed?

A The Federal Bureau of Investigation.

Q And where are you employed?

A I am stationed at Elmira, New York.

Q And how long have you been with the FBI?

A Twenty-four years.

Q I call your attention to the date of January 18th, 1974.

Were you stationed in Elmira at that time?

A I was.

Q And at that time did you go to the Small Business Administration office in Elmira with Special Agent Rudy?

A Yes, I did, sir.

Q And is Mr. Rudy your partner?

A Yes, he is, sir.

Q And just the two of you are stationed down in Elmira?

A Yes, sir.

Q Would you tell the members of the jury approximately what time you arrived at the Small Business Administration office?

A It was shortly after noon, like twelve ten, twelve fifteen, something like that.

Q Did you see Mr. Conlin there at that time?

A Yes, I did, sir.

Q What was he doing at that time?

A He was standing by one of the desks in the Administrative

Office.

Q And was this in a private office of one of the individuals or a main office?

A It was in the open area of the main office.

Q And what was he doing at that time, if anything?

A He was just standing there at that time.

Q And did you have a conversation with him at that time?

A Yes, sir.

Q What was that?

A I asked Mr. Conlin what was going on, and I asked him where were the papers that he had allegedly taken from the file that we had been told about.

Q And what did he say to you?

A He did not answer me. X 11)

Q Did you say anything else to him?

A Not at that time, no, sir.

Q How long were you there at this Small Business Administration office?

A (No response.)

Q I show you Government's Exhibits 48, 49 and 47 marked for identification, which have been previously identified by Mr. Rudy, and perhaps one of those might refresh your recollection.

(Government's Exhibits 47, 48

and 49 handed to the witness.)

A We were there about forty-five or fifty minutes.

Q And during that period of time, you say when you first arrived Mr. Conlin was standing up in the main office?

A Yes.

Q Did there come a time that Mr. Conlin sat down?

A No, sir. Mr. Conlin, when he declined to answer me as to when I asked what was he doing, and he should give back any papers that he might have taken, my partner got on the telephone and I stayed with Mr. Conlin. By that, I mean I stayed physically with him, within a foot or two of him, and kept by eye on him until the matter was resolved, and Mr. Conlin walked about the open part of the office for the next fifteen, twenty minutes or so, and I do recall telling him at one point to stay still, you know.

X Q Was he doing anything while he was walking around the office?

A Yes, sir.

Q What was he doing?

A He was carrying a briefcase, and he held the briefcase in his left hand in front of him, and he was putting his right hand in his pocket, pulling something out of his

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pocket, and making motions as if he was stuffing material inside his dress shirt, but the briefcase blocked that part, but, of course, I could see all this hand movement and arm movement.

Q And about how long did this go on?

A Twenty minutes, possibly.

Q And then you asked him to sit down?

A I don't recall asking him to sit down, sir.

Q Did he ultimately sit down?

A I don't remember him sitting down.

Q Did you have him stand in one spot?

A I did ask him to stop, you know, running around the whole office, yes, sir.

Q Did he say anything to you during the period of time that you were at the Small Business Administration office?

A I don't recall him saying anything to me. (3)

Q Did he attempt to call his lawyer?

A I believe he did make a telephone call for that purpose. (4)
I don't think it was completed, as I remember it.

Q Did there come a time that you left the Small Business Administration office?

A Yes, sir, after he was placed under arrest.

Q Now Government's Exhibit 43 is the log of the arrest, is

that right?

A Yes, sir.

Q And that is signed by you as well as Special Agent Rudy?

A Yes, sir.

Q About what time did you place Mr. Conlin under arrest?

A At 12:49 p.m., January 18th.

Q You arrived there approximately 12:10?

A Yes.

Q And at 12:49 he was placed under arrest?

A Yes, sir.

Q Did he say anything to you, give any explanations at all during that period of time?

A No, sir.

Q What, if anything, did you do after Mr. Conlin was placed under arrest?

A After he was placed under arrest, we notified him that we were going to search his person incidental to arrest and because of the observations I had made of what he was doing during the period immediately prior to arrest. We secured a private room at the building and took Mr. Conlin there and searched his person.

Q And was this a forcible search, or did he voluntarily take his clothes off?

(6)

A There was no force involved, although Mr. Conlin did not make any statements to us. He did what he was instructed. He didn't fight us in any way.

Q There were some papers then taken, is that correct?

A We found papers in Mr. Conlin's coat pocket, and inside his shirt, and he had removed his tie and his coat and his dress shirt and his trousers, and when he removed his trousers, and when he removed his dress shirt, a number of torn pieces of paper did fall on the floor and were recovered by myself and Mr. Rudy.

Q Were you present when the photographs, Government's Exhibit 50 in evidence, were taken?

A Yes. I remember that being taken in our office.

Q And those were the papers that had been taken from Mr. Conlin, that fell to the floor?

A It appears to be the photograph.

Q You didn't take this one?

A No, but I was there when Mr. Rudy took a picture of the piles of paper.

Q Did there come a time that you ultimately left the Small Business Administration office with Mr. Conlin?

A Yes, sir, immediately after the search in that private room that I spoke of, and we went to my office, the Resident

Agency office in Elmira, and as soon as we arrived there, I contacted the United States Magistrate for the purpose --

Q Is he located in Elmira?

A He is located in a building in close proximity to our office.

Q And how long were you at your office?

A A little over an hour, an hour and ten minutes, maybe.

Q And during that period of time, did you have any conversations with Mr. Conlin?

A Yes, sir.

Q Explain to us what they were?

A When we got to our office, and since Mr. Conlin had just been arrested, he was fingerprinted and photographed, and Mr. Rudy left to file the complaint at the United States Magistrate's office, and I felt it would be more comfortable for Mr. Conlin and I to merely wait in our office, which is directly across the street from the Magistrate's office. So we remained there for about an hour after Mr. Rudy had gone and after he had been fingerprinted and photographed. Mr. Conlin had previously refused any comments, so I made no attempt to interview him. I remember I did make attempts to make small talk, so to speak. The two of us were in the office for an hour, and I didn't elicit much

response from Mr. Conlin. He did ask to use the telephone again, and I believe he called his office in Corning from my office. Then I would say after we had been in the office forty, forty-five minutes, Mr. Conlin did volunteer some statements to me, which I noted down, and which I do recall.

Q What were these statements?

A We were sitting in the office, and I don't remember his exact phraseology, but I think he said, "The reason I tried to take those tax returns, or papers, is because a red-headed male employee of the SBA told me that I couldn't leave the office with them."

He also told me that the papers which he had torn and which we had found on his person were not previously given to the SBA, although he realized the SBA officials maintained that. And he told me that he had just given them to the SBA that morning and that they were copies of unfiled tax returns of his client, Thomas Gill.

He further told me that he and his client were being interviewed by a Mr. Cristofaro of the SBA and that after he had given these copies of unfiled tax returns of Mr. Gill, Mr. Cristofaro returned them asking that Mr. Gill sign and date them as the taxpayer and that Mr. Conlin

sign and date them as the preparer, and they both did so. He gave the signed copies back to Mr. Cristofaro and were then given a letter by Mr. Cristofaro which stated, in part, that the SBA desired authenticated copies of Mr. Gill's tax returns for that year, tax returns which bore the official IRS stamp, showing that they were true copies. And he said that since these were not copies of returns that had ever been filed, that these were unfiled returns, that they could never be authenticated as being true copies, because he never filed them. So he felt he should take them back. He concluded by stating that had he been given this letter requesting authenticated copies marked to show they were true copies, he never would have given Mr. Cristofaro the copies he did give that day. And that is all I recall.

Q And this conversation took place about an hour and a half after you first made contact with Mr. Conlin?

A (No response.)

Q Is that right, you were forty-five minutes at the Small Business Administration office?

A Yes, about an hour and a half after we originally got to the SBA office, shortly after noon that day.

Q And it was forty-five minutes in the SBA office, and he

never said anything to you?

A No, and I attempted to talk to him at that point, and he declined to answer me. (8)

Q And then you were forty-five minutes in your own office, and you didn't attempt to interview him at that time, but forty-five minutes passed before he volunteered the statement that you just told us about, is that right?

A Yes, with the times being approximate.

Q At the time that you were at the Small Business Administration office with Mr. Conlin, did you ask him why he had taken the returns, or why he had taken the papers?

A No, sir.

Q Did you ask him why he was ripping up the papers?

A No, sir, because when I first saw Mr. Conlin, he was not ripping up papers. He was merely standing there. And when I went to him, after being told that he had possession of these papers, and we introduced ourselves and showed our identification that we were special agents of the FBI and I asked him to return any papers that he might have had, that he could not take these, and he didn't do this, and it was thirty minutes later, probably, before he was ultimately arrested, because we didn't want to arrest him. It seems a little silly that he wouldn't give us the

papers, you know, but he made no comment to me at all.

MR. HOULIHAN: Thank you. I
have no further questions.

CROSS EXAMINATION

BY MR. LEVY:

Q Did you help your partner in search of Mr. Conlin?

A Yes, I did, sir.

Q In that search, did you look in his briefcase?

A I don't recall looking in his briefcase.

Q Did any of the parts of the papers shown in Exhibit G-50
come from his briefcase?

A Not to my knowledge, sir, no.

Q And you are telling us that you saw Mr. Conlin with his
briefcase open, taking and putting papers in and out of it,
and you didn't search his briefcase?

A No, I did not say that, sir. The briefcase was not opened.
The briefcase was being held in front of him (indicating),
shielding his actions, obviously.

Q So you never looked in his briefcase, to your memory?

A I didn't, no, sir, but it would certainly be natural when
you arrest a person who has a briefcase to examine that
briefcase.

Q But you didn't do it?

A No, I don't have a recollection of it, sir.

~~STATE OF NEW YORK~~

~~Court, County of~~

UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

UNITED STATES OF AMERICA,

Plaintiff -
Appellee,

against

WALTER R. CONLIN,

Defendant -
Appellant.

STATE OF NEW YORK }
COUNTY OF MONROE } ss.
CITY OF ROCHESTER }

BERNADETTE J. TUTTLE

, being duly sworn, deposes

and says: I am over the age of eighteen years and am an employee of
Nixon, Hargrave, Devans & Doyle, the attorneys for the defendant-appellant

in the above entitled
action.

On the 31st day of March, 19 77, before 5:00 o'clock

P. M., in the City of Rochester, Monroe County, N. Y., I personally served a copy of the annexed
PETITION FOR RE-HEARING WITH A SUGGESTION FOR A RE-HEARING IN BANC
in said action, upon GERALD J. HOULIHAN, Ass't. U. S. Attorney,

Esq., the attorney for the plaintiff-appellee in the above
entitled action, by depositing the same properly inclosed in a postpaid wrapper, in a post-office box regularly
maintained by the government of the United States, in the City of Rochester, Monroe County, N. Y., that
being the post office of said defendant-appellant's

attorneys, directed to Gerald J. Houlihan, Esq.,
at No. 233 U. S. Courthouse, in
the City of Rochester County of Monroe, N. Y., that
being the address within the state theretofore designated by said attorney for that purpose upon the preced-
ing papers in this action, and between which places there then was and now is a regular daily communication
by mail.

Bernadette J. Tuttle

Sworn to before me this

31st day of March, 19 77.

Maryann Willis
MARYANN WILLIS
Notary Public in the State of New York
MONROE COUNTY, N. Y.
Commission Expires a 30, 19 79